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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO CASILLAS,

Defendant and Appellant.

D053835

(Super. Ct. No. SCD206214)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian III, Judge. Affirmed.

A jury convicted Fernando Casillas of robbery (count 1) and assault with a deadly weapon (count 2). The jury found true the allegations that Casillas had personally used a firearm as to both counts. On count 1, the jury also found true the allegation that Casillas intentionally and personally discharged a firearm. The court sentenced Casillas to prison for 22 years.

The sole issue on appeal is whether the trial court committed reversible error when it failed to instruct the jury on circumstantial evidence under CALCRIM No. 225. We conclude the trial court did not err in instructing the jury with CALCRIM No. 224 instead of CALCRIM No. 225, and, in any event, any error was harmless. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the night of April 27, 2007, Donald Freeman and Maria Hector were in Freeman's parked van watching a DVD movie. Freeman sat in the driver's seat while Hector was seated on the back seat. Two men, later identified as Casillas and Noe Perez, approached the passenger side of the van and signaled for Freeman to roll down the window. Freeman unlocked the doors and the two men rushed into the van. Perez tried to stab Freeman in the stomach. Freeman fought back but sustained a stab wound to his leg. Casillas fired a gun aimed at Freeman's head, but missed. Freeman was able to get out of the van and run away without being shot. As he ran, he heard a second shot being fired. Freeman watched from a distance and saw Casillas and Perez get out of the van and leave the immediate area. Freeman returned to the van. After confirming that Hector was unharmed, he picked up the keys to the van which were lying on the ground outside the passenger door, and proceeded to follow Casillas and Perez in the van. While driving, Freeman called 911. Freeman described his assailants as two Hispanic males wearing blue jeans with one assailant wearing a blue striped shirt and the other wearing a solid blue shirt.

Police officers Pollom and Nigro separately responded to the 911 call. As Officer Pollom approached the two suspects, he saw Casillas kneel beside the front tire of a

parked car. After Officers Pollom and Nigro handcuffed the suspects, Officer Pollom found a gun where Casillas had been kneeling. Three of the six shells had been fired. Officer Pollom also impounded a folding knife he found wedged in a fence nearby. The officers retrieved from Perez a black bag containing Freeman's portable DVD player and DVDs.

After the arrest, Freeman identified Casillas as the individual who shot him. He identified Perez as the individual who attacked him with the knife. Freeman did not identify Casillas or Perez at a preliminary hearing. At trial, Freeman identified the two men and explained that he had not identified them at the preliminary hearing because he was scared.

Hector testified that although she saw only one person get in the van, there could have been two people. She also testified to seeing a gun and hearing a gunshot. She said the individual had been wearing a blue striped shirt. Hector testified that the shirt Casillas had been wearing at the curbside lineup was not similar to the shirt worn by the man whom she saw enter the van.

A ballistics expert testified that the bullet recovered from the driver's side door of Freeman's van matched the revolver that the officers found at the scene. DNA tests performed on the gun by a criminalist showed there were three different contributors. Perez and Freeman were excluded as having contributed to the sample, but Casillas could not be excluded as a contributor. The criminalist testified that 1 in 130 persons in the Hispanic population would be identified as possible contributors.

Casillas requested the court instruct the jury with CALCRIM No. 225, which focuses on circumstantial evidence to prove intent. After reviewing both CALCRIM No. 224 and CALCRIM No. 225, the trial court denied the request and instructed the jury on how to consider circumstantial evidence in accordance with CALCRIM No. 224.

DISCUSSION

The issue on appeal is whether the trial court erred by denying Casillas's request for CALCRIM No. 225 and instead instructing the jury with CALCRIM No. 224.

CALCRIM No. 224 provides:

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to find defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

CALCRIM No. 225 provides:

"The People must prove not only that the defendant did the acts charged, but also that (he/she) acted with a particular (intent/ [and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/ [and/or] mental state) required.

"A[n] (intent/ [and/or] mental state) may be proved by circumstantial evidence.

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you

must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/ [and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/ [and/or] mental state). If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/ [and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/ [and/or] mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

The trial court must instruct the jury on the general principles of law relevant to the issues raised by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) This includes the duty to instruct on how to evaluate circumstantial evidence if the prosecution relies substantially on circumstantial evidence to prove any element of the case. (*People v. Yrigoyen* (1955) 45 Cal.2d 46, 49). CALCRIM No. 223 defines direct and circumstantial evidence and explains that "[b]oth direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other." CALCRIM Nos. 224 and 225 explain how the jury should evaluate circumstantial evidence in deciding whether a fact has been proved. Use of CALCRIM No. 224 rather than CALCRIM No. 225 is proper unless intent or mental state is the only element of the offense that rests substantially or entirely on

circumstantial evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 352, addressing former CALJIC Nos. 2.01 and 2.02.)

The court applied these principles in *People v. Marshall* (1996) 13 Cal.4th 799. In that case, the trial court properly instructed the jury with CALJIC No. 2.01 (predecessor to CALCRIM No. 224) instead of CALJIC No. 2.02 (predecessor to CALCRIM No. 225). The appellate court concluded that CALJIC No. 2.01 was "the more inclusive instruction" on the sufficiency of circumstantial evidence. (*People v. Marshall, supra*, at p. 849.) Because intent or mental state for premeditated and deliberate murder was not the only element of the offense that rested substantially or entirely on circumstantial evidence, the use of CALJIC No. 2.01 was proper. (*People v. Marshall, supra*, at p. 849.) "In reviewing a claim of error in jury instructions in a criminal case, [we] must first consider the jury instructions as a whole to determine whether error has been committed." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1330.)

Here, the People relied on circumstantial evidence to prove other elements in addition to Casillas's mental state. The trial court correctly noted that circumstantial evidence was being used to prove identity and show Casillas personally used and discharged a handgun for the purpose of the firearm enhancement.

To prove Casillas was the perpetrator in the robbery and assault of Freeman, the People relied on both direct and circumstantial evidence. Direct evidence included Freeman's identification of Casillas at the curb-side lineup. Hector's testimony regarding the assailant also provided direct evidence for the People's case.

The People further supported its case with a substantial amount of circumstantial evidence. The shirt that Casillas wore was similar to the shirt described by Freeman during his 911 call. Casillas and Perez were found walking in the area where the incident had occurred and in the direction that Freeman had described during the call. Perez was carrying a DVD player and DVD when he was stopped by the officers. Officer Pollom's testimony that he saw Casillas kneel next to the location where the gun was recovered and the bullets recovered from the gun provide circumstantial evidence that Casillas had used it. Finally, Casillas could not be excluded as a contributor to the DNA found on the gun. These facts are circumstantial evidence because they do not directly prove that Casillas was the perpetrator, but instead require a logical and reasonable inference from the fact finder. (Evid. Code, § 410.)

The People also used circumstantial evidence to establish the firearm enhancements. Each enhancement required proof that Casillas personally used and intentionally and personally discharged a firearm during the robbery. The People again relied on Officer Nigro's testimony that Casillas was seen kneeling next to the location where the gun was discovered. In addition, Casillas could not be excluded as a contributor to the DNA found on the gun. Although this evidence did not directly show Casillas used and intentionally discharged the gun, it required a logical and reasonable inference from the fact finder and thus constitutes circumstantial evidence. (Evid. Code, § 410.)

The People relied heavily on circumstantial evidence to prove both identity and possession of the weapon. Intent was not the only element that rested substantially or

entirely on circumstantial evidence. CALCRIM No. 224 is more inclusive, instructing the jury how to evaluate circumstantial evidence with regard to intent, as well as the other elements of the crime. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1172.) Therefore, the trial court did not err by instructing the jury with CALCRIM No. 224 instead of CALCRIM No. 225.

Even if we were to conclude the trial court erred in failing to give CALCRIM No. 225, the error was not prejudicial. Instructional error is reviewed under either *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836. Casillas seeks review under the *Chapman* standard, which requires reversal unless we conclude beyond a reasonable doubt that the error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Under the alternative standard of *Watson*, reversal is not required unless it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) We need not decide whether the *Chapman* or *Watson* standard for prejudicial error applies here because the error was harmless under either standard.

CALCRIM No. 224 adequately covers the legal principles that govern the use of circumstantial evidence. The People correctly note that where a trial court gives a more inclusive instruction, its failure to additionally instruct with the more specific CALCRIM No. 225 is not prejudicial error. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.) CALCRIM No. 224 and CALCRIM No. 225 are substantially the same. Both CALCRIM No. 224 and CALCRIM No. 225 instruct the jury on how to evaluate circumstantial evidence. The only difference between the two instructions is that

CALCRIM No. 225 specifically focuses the jury on the intent element. Under the more stringent *Chapman* test, we conclude, beyond a reasonable doubt, that "the guilty verdict actually rendered in this trial was surely unattributable to [instructional] error." (*People v. Flood* (1998) 18 Cal.4th 470, 494, italics omitted.)

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McDONALD, Acting P. J.

AARON, J.